HUSSIN ISMAIL

V.

PP

HIGH COURT MALAYA, TEMERLOH
VT SINGHAM JC
[CRIMINAL APPEAL NO: 41-77-98]
7 JULY 2000

CRIMINAL PROCEDURE: *Trial - Case to answer - Whether magistrate was correct in calling for defence - Test to be applied at the end of prosecution's case - Criminal Procedure Code, s. 173(f)*

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Whether sentence excessive - Factors to be considered in imposing sentence*

CRIMINAL LAW: *Charge of causing death by dangerous driving - Appeal against conviction and sentence - Whether ingredients of offence proved - Whether identity of deceased established*

The appellant was charged for an offence under s. 4(1) of the Road Transport Act 1987, to wit, driving in a dangerous manner and causing the death of one Badar bte Awang Ahmad ('the deceased'). The appellant was charged in the Magistrate's Court, found guilty, convicted and sentenced to two years' imprisonment from the date of sentence and disqualified from driving for one year.

He appealed against the conviction and sentence. The grounds of appeal are as follows, namely: (i) that the learned magistrate had erred in law and in fact when he accepted the entire evidence of witnesses as truth before hearing the evidence of the appellant, in that he had made a maximum evaluation of the prosecution's evidence before hearing the evidence of the appellant; (ii) that the learned magistrate had failed to take into account that the prosecution had failed to prove all the details and ingredients of the charge, namely the identity of the deceased; and (iii) that the sentence imposed on the appellant was manifestly excessive.

Held:

[1] The date of the alleged offence was 14 August 1994 which was before the date of the amendment to s. 173(f) of the Criminal Procedure Code ('CPC') which took effect from 31 January 1997. The test to be applied at the end of the prosecution's case was beyond reasonable doubt.

[2] In relation to the identity of the deceased, it is not sufficient for the medical officer to merely say that he received an injured person from the police. The medical officer should also state where he obtained the name of the injured person, unless he knew the injured person personally.

[2a] The facts of the case disclosed that although the investigating officer, the husband of the deceased and the medical officer who examined the deceased were called to testify, none of them was asked any question pertaining to establishing the identity of the deceased. In fact there was no evidence adduced through any of the witnesses as to the identity of the deceased. The investigating officer and the medical officer failed to even identify each other and the medical officer was not even asked how he obtained the name of the deceased as stated in the medical report.

[2b] The prosecution therefore had failed to prove the identity of the deceased which was an essential and important ingredient of the charge under s. 41(1) of the Road Transport Act 1987. The learned magistrate ought not to have called the appellant to enter his defence but instead should have amended the charge to a lesser offence under s. 43(1) of the Road Transport Act 1987 which refers to driving a motor vehicle without due care and attention or without reasonable consideration for other persons using the road.

[3] The court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he received, the extent of violence involved, the antecedents of the prisoner up to the time of the sentence, his age and character.

[3a] Taking into account the character, age and antecedents of the appellant, a sentence of RM1,500 and in default six months' imprisonment and his driving licence ordered to be endorsed is considered to be sufficient.

[Appeal allowed; charge amended to a lesser offence; sentence accordingly.]

Case(s) referred to:
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 ***(foll)***
Gunasekaran Buchia lwn. PP [1995] 2 CLJ 397 ***(foll)***
Lim Yoon Fah v. PP [1971] 1 MLJ 37 ***(refd)***
Mohamed Jusoh Abdullah & Anor v. PP [1947] 13 MLJ 130 ***(foll)***
PP v. Doraigunaraju Krishnan [1993] 3 CLJ 664 ***(refd)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 270 ***(refd)***
Sia Soon Suan v. PP [1996] 1 MLJ 116 ***(refd)***
Teay Wah Cheong v. PP [1964] 30 MLJ 21 ***(foll)***

Legislation referred to:
Criminal Procedure Code s. 173(f)
Road Traffic Ordinance 1958, s. 34A
Road Transport Act 1987, ss. 41(1), 43(1)

Other source(s) referred to:
Halsbury's Laws of England

For the appellant - Harinder Singh; M/s Mahinder & Co
For the respondent - Iskandar Ali Dewa DPP

Reported by Mariette Peters-Goh

JUDGMENT

VT Singham JC:

This is an appeal against the decision of the learned magistrate, magistrate's court, Jerantut wherein the appellant was convicted and sentenced to imprisonment for two years from 5 November 1998 and his licence was ordered to be suspended for one year for an offence under s. 41(1) of the Road Transport Act 1987. Hence, this appeal by the appellant/accused.

Amended Charge

The amended charge reads as follows:

> Bahawa kamu pada 14/8/94 jam lebih kurang 3.00 petang di Simpang Tiga, Felda Jengka 15, Jalan Besar Bandar Pusat Jengka, di dalam Daerah Maran, di dalam Negeri Pahang Darul Makmur sebagai pemandu m/kar No: CY 1258 telah memandu kenderaan tersebut diatas jalan raya dengan cara yang mana memandangkan kepada semua syarat-syarat dan kegunaan jalan raya dan banyaknya lalulintas yang ada diatas jalan raya adalah merbahaya kepada orang awam dan dengan itu kamu telah menyebabkan kematian kepada Badar Bte Awang Ahmad KP No. 4529891, umur 42 tahun. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 41(1) Akta Pengangkutan Jalan 1987 (Akta 333).

The prosecution called ten witnesses to establish the charge against the appellant. Two of the prosecution witnesses were eye-witnesses to the accident, namely, the deceased's husband Mat Zuki Majid SP3, and an independent witness Mohamad Ghazali Mat, SP5. The other material witnesses were the Investigating Officer Chief Insp. Ramadzan Abdul Rahim SP8, and Dr. Manivannan Varathan SP10.

Evidence Of SP3

The evidence of SP3 is as follows:

Evidence-In-Chief

On 14 August 1994, at about 2pm, he left from Jengka 20 to go to Jengka 15. He lives at Jengka 20. He was riding m/cycle No: CAF 6746 and his pillion was his wife, the deceased. He was involved in an accident when he intended to enter a junction which is on the right of Jengka 15. He gave the right signal light and also his hand signal. He gave the signal light about three chains before the junction. He was knocked from the rear. The accident occurred on the center of the road near the center white line. He was informed later by SP5 that the m/car which collided into his m/cycle was a Toyota Corolla. He then lodged a police report on 6 September 1994 which was marked as exh. P6. He was also admitted into Hospital Mentakab and he only recovered on 6 September 1994 when he lodged the police report exh. P6.

Cross-Examination Of SP3

Under cross-examination, he said that he was discharged from the hospital on 31 August 1994. He only lodged police report on 6 September 1994 as he had not recovered from his injuries. En. Mohamad Ghazali SP5 informed him when he returned home from hospital that SP5 was following the appellant's m/car when the accident occured. He maintained that he gave the light signal and also the hand signal by stretching out his right hand. He confirmed that his m/cycle's signal light was functioning. He confirmed that he saw a m/car from the rear at a distance. He maintained that he only moved to the center of the road to enter the junction when he reached near the junction. The actual impact was near the junction.

Evidence Of SP5

The evidence of SP5 is as follows:

Evidence-In-Chief

He lives in Jengka 20. On 14 August 1994, he left Jengka 20 at about 2.30 pm to go to Jerantut. At a junction at Jengka 15, he witnessed an accident. He was driving his m/car and in front of his m/car was a m/cycle. He did not know whose m/cycle it was but he saw two persons on the m/cycle. Suddenly, he saw the appellant's m/car from his rear overtaking him and at the time, there were two m/lorries coming from the opposite direction. The accident took place at the center of the road near the junction to Jengka 15. He saw the appellant's m/car had collided into the rear of SP3's m/cycle. He saw the signal light of m/cycle. He saw the m/cycyle moving from the left side to the center of the road. The appellant's m/car knocked at the rear side of m/cycle. The left side of the m/car collided into the rear side of the m/cycle. The appellant's m/car overtook him at double line. At the time he did not know the appellant was the driver of m/car and he also did not know who was the rider and pillion of the m/cycle. He informed the rider of m/cycle SP3 at the hospital that he had witnessed the accident.

Cross-Examination Of SP5

On seeing the accident he became frightened and could not drive his m/car. He did not render any assistance as he was frightened but he saw a shopkeeper who had rendered assistance. The cause of the accident was because the appellant's m/car tried to overtake SP3's m/cycle when the m/cycle was near the center of the road intending to turn right.

Evidence Of SP7

Dr Nordiana bte Abdul Latif

On 14 August 1994, she was on duty at Hospital Mentakab. She received SP3 who was injured and she treated him and she testified as to the nature of his injuries.

Evidence Of The Investigating Officer SP8

He was on duty on 14 August 1994 at the traffic branch at Police Station Maran. He related the damage to both the appellant's m/car and SP3's m/cycle which was as follows:

> **Kerosakan-kerosakan m/sikal** iaitu badan m/sikal sebelah kanan, di tangki minyak kemek ke dalam. Pemijak kaki penunggang dan penumpang kemek ke dalam. Bakul bawa barang kemek, kemek ke dalam juga di sebelah kanan. Pemijak gear bengkok ke dalam juga bahagian dalam.

Plastik penghadang angin koyak di kanan. Tiada number plet depan dan belakang. Signal kanan belakang pecah. Badan m/sikal bengkok di bahagian tengah juga dan juga sebelah kanan.

Damage To Appellant's M/car

Ia rosak bumper depan kiri kemek ke dalam. Lampu besar depan kiri pecah. Signal depan sebelah kanan pecah. Mudguard kiri bahagian depan kemek ke dalam. Cermin besar depan pecah. Ada kesan lekuk depan kiri dan cermin depan tingkap kiri pecah.

The Investigating Officer SP8 identified SP3 as the rider of the m/cycle and that the pillion-rider was SP3's wife, Badar Awang. Post-mortem was carried out at Hospital Jengka. He produced a copy of the post-mortem report which was subsequently marked as exh. P11. He had also sent both the vehicles for examination by the RIMV and produced two reports of the examination and marked as exhs. P12 and P13.

Cross-Examination Of SP8

He denied SP3's m/cycle was removed from its original position after the accident. He did not send the glass fragments to chemist for analysis. There was an independent eye-witness to the accident namely, SP5.

Evidence Of Dr Manivannan Varathan – SP14

On 14 August 1994, he was on duty at Hospital Jengka. He examined the body of the deceased who was brought in dead. He did not carry out post-mortem of the deceased as there were no facilities available to carry out post-mortem. The cause of her death was the back bone near the neck was broken.

Cross-Examination Of SP14

He does not know the deceased personally. In order to know the actual cause of her death, a post-mortem has to be carried out. His conclusion of the cause of her death was based on clinical examination. He is not a pathologist. He admitted that he does not know the actual cause of the death of the deceased.

Conclusion Of The Prosecution Case

At the conclusion of the prosecution case, the learned magistrate found that the prosecution had made a *prima facie* case against the appellant and ordered the appellant to enter his defence. It is important to state here that the standard of proof at the time when the learned magistrate made a finding at the close of the prosecution case on 8 September 1998 was

beyond reasonable doubt and not *prima facie* as held by the learned magistrate and as submitted by both the prosecuting officer and the then defence counsel. The date of the alleged offence was 14 August 1994, which was before the date of the amendment to s. 173(f) of the Criminal Procedure Code which came into effect from 31 January 1997 (*Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645 at p. 664).

Defence Case

Evidence Of Appellant

On 14 August 1994, at about 2pm, he was driving his m/car No: CY 1258 from Temerloh and intending to go to town center Jengka. The accident occurred at Simpang Jengka 15. He did not see any vehicle in front of him at the time. He saw SP3's m/cycle on the left edge side of the road. He saw two persons on the m/cycle, a female person and a male person. He was not aware of any vehicles coming from his rear. There were no other vehicles in front of him apart from SP3's m/cycle. He tried to overtake SP3's m/cycle. At the time when he wanted to overtake, SP3's m/cycle was still on the left side of the road. Suddenly, he heard a knock of a m/cycle colliding into a m/car. SP3's m/cycle suddenly turned to the right to enter the junction. He did not see any signal light to turn right on SP3's m/cycle. He decided to overtake because there were no vehicles coming from the opposite direction and there were no signal light to turn right from SP3's m/cycle. He thought SP3's m/cycle will be proceeding straight on. As SP3's m/cycle turned right, it immediately collided into his m/car. He saw both the rider and the pillion of m/cycle wearing helmets.

Cross-Examination Of Appellant

Before the accident he did not overtake any other vehicle. The first time he saw SP3's m/cycle was on the left side of the road. He did not pass the center white line. At the time of the accident, both SP3's m/cycles and his m/car were side by side. He does not know how both SP3 and his pillion fell from the m/cycle. He actually did not see how the accident and the collision occurred.

Re-Examination Of Appellant

The accident occurred so fast. He cannot confirm how the accident occurred. He assumed that the m/cycle turned right and he personally did not see it. He assumed that the m/cycle turned right because if m/cycle did not turn right the accident would not have occurred as the m/cycle collided into him.

Conclusion Of Defence Case

At the conclusion of the defence case, both the defence counsel and the prosecuting officer made their respective submission.

Decision Of Trial Court

The learned magistrate found that the defence had failed to raise any reasonable doubt to rebut the prosecution case and found that the prosecution had proved its case beyond reasonable doubt. The learned magistrate found the appellant guilty, convicted and sentenced him to two years imprisonment and ordered his driving licence to be disqualified for one year.

Appeal

Grounds Of Appeal Against Conviction

The learned counsel for the appellant, *inter alia* raised two main grounds to support his contention that the conviction under s. 41(1) of the Road Transport Act 1987 against the appellant cannot stand in law, namely:

(a) the learned magistrate erred in law and in fact when he accepted the entire evidence of the prosecution witnesses as the truth before hearing the evidence of the appellant. In other words, the learned defence counsel's contention was that the magistrate had made a maximum evaluation of the prosecution evidence before hearing the evidence of the appellant;

(b) the learned magistrate failed to take into account that the prosecution had failed to prove all the details and ingredients of the charge namely, the identity of the deceased.

Ground Of Appeal Against Sentence

As to the sentence, the appellant's counsel submitted that the sentence imposed on the appellant was manifestly excessive.

Submission Of Deputy Public Prosecutor

The learned Deputy Public Prosecutor on the other hand contended *inter alia* that the prosecution had proved its case beyond reasonable doubt and the learned magistrate was right in calling for the appellant's defence. He also submitted that the defence had failed to raise any reasonable doubt on the prosecution case. He further submitted that the prosecution had conclusively proved the identity of the deceased as SP10 had confirmed

that the patient whom he had examined on 14 August 1994 was the deceased Badar Awang Ahmad. He said that the Medical Officer SP10 confirmed his medical report of the deceased which was marked as exh. P11.

Case Law On Identity Of Deceased

In *Teay Wah Cheong v. PP* [1964] 30 MLJ 21 at p. 22, his Lordship the late Hashim J said:

> (a) The identity of the deceased person was not conclusively proved. It is not sufficient for the medical officer to say that he received an injured person from a police corporal and that the patient was Abdul Salam s/o Akob. The medical officer had to state as to where he obtained the name of the injured person unless he knew the injured person personally. The police corporal who took Abdul Salam to hospital did not say in his evidence that he identified Abdul Salam to the medical officer. There is nothing in the record to show how the medical officer obtained Abdul Salam's name. The medical officer stated *inter alia* that the "patient died at 10.30am the same day" and "I handed the deceased to his relative on the same day". In my opinion this is not sufficient to prove identification of the deceased person. The medical officer should have stated clearly that he personally saw the dead body of Abdul Salam s/o Akob and that he personally handed the dead body of Abdul Salam to the relative who should have been called for identification by the medical officer. There does not appear to be in the record of proceedings who this "relative" was. The wife of Abdul Salam simply stated that she accompanied her husband to the hospital with the police and she identified her husband to the police on the same day the husband died.

In another case, *Gunasekaran Buchia lwn. PP* [1995] 2 CLJ 397 at p. 402, his Lordship A. Hamid Embong, Judicial Commissioner as his Lordship then was, followed the princple in *Teay*'s case and quashed the conviction of the appellant who was convicted under s. 34A of the Road Traffic Ordinance 1958 and sentenced to a fine of RM3,000 and in default six months imprisonment by the magistrate court, Teluk Intan as the identity of the deceased in that case was not conclusively proved. The date of the alleged offence in that case was 23 August 1987.

His Lordship A. Hamid Embong JC said:

> Kepincangan P6 seperti dihujah oleh Encik V.T. Singam adalah terhadap penentuan identiti simati. Tiada catitan disebut disitu bahawa simati telah dicamkan kepada pengawal perubatan yang menjalankan bedah siasat. Saya

bersetuju dengan pendirian ini. Setelah meneliti keterangan saksi-saksi, terutamanya keterangan pegawai-pegawai penyiasat (dua orang bagi kes ini) saya perhatikan bahawa fakta penting ini juga tidak dikemukakan oleh pihak pendakwa melalui testimoni. Dan oleh kerana P6 bukan merupakan satu laporan yang telah disediakan sendiri oleh pegawai yang menjalankan bedah siasat, maka pada pendapat saya, amatlah penting bagi keterangan sekundar ini dijelaskan oleh pegawai yang menyediakannya. Iaitu Dr. Awtar Singh. Kegagalan pihak pendakwa untuk memanggil saksi ini, malah tidak juga menawarkannya kepada perayu, telah, pada pandangan saya menimbulkan keraguan terhadap kes pendakwaan. Identiti si mati merupakan satu bahan penting bagi pertuduhan dibawah s. 34(A)(1) RTO. (Sila lihat *Teay Wah Cheong v. Public Prosecutor*, diatas).

In the instance case although SP3, the husband of the deceased, the Investigating Officer SP8 and the medical officer SP10 who examined the deceased were called to testify on behalf of the prosecution, the prosecuting officer at the lower court did not ask these three witnesses any question to establish the identity of the deceased. Infact there was no evidence adduced through any of the witnesses as to the identity of the deceaced. The Investigating Officer SP8 and the medical officer SP10 also did not identify each other. The medical officer SP10 was not even asked how he obtained the name of the deceased as stated in the medical report of the deceased which was marked as exh. P11.

Finding Of Appellate Court

On going through the whole of the printed evidence, this court finds that the prosecution had infact succeeded to prove one of the ingredient of the charge, namely, driving in a manner which is dangerous to the public against the appellant on the facts as adduced through SP3, SP5 and SP8 as to the circumstances in which the accident occured. However, this court regret that the prosecution had not adduced any evidence to prove the identity of the deceased which is also an essential and important ingredient of the charge under s. 41(1) of the Road Transport Act 1987. Consequently, the charge under s. 41(1) of the Road Transport Act 1987 cannot stand in law. It was the duty of the prosecution to prove conclusively the identity of the deceased in order to sustain the charge.

In the circumstances, this court with regret finds that the prosecution had failed to prove the charge against the appellant to an offence under s. 41(1) of the Road Transport Act 1987 on the totality of the evidence of the prosecution. In *Sia Soon Suan v. PP* [1996] 1 MLJ 116 at p. 118, his Lordship H.T Ong Ang CJ (Malaya) (as his Lordship then was) when delivering the judgment of the Federal Court said:

> Nevertheless, the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else. This is axiomatic.

Therefore, the learned magistrate ought not to have called the appellant to enter on his defence to the offence under s. 41(1) of the Road Transport Act 1987 and instead should have amended the charge to a lesser offence under s. 43(1) of the Road Transport Act 1987. Section 43(1) of the Road Transport Act 1987 reads as follows:

> A person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding six months.

In this case, it is important to state that SP3, the rider of the m/cycle was injured in the accident and his medical report was produced to support his injuries and marked as exhibit P4.

Decision Of Appellate Court

Accordingly, the appeal is allowed. The conviction and sentence against the apellant under s. 41(1) of the Road Transport Act 1987 is quashed and set aside and substituted with the lesser offence under s. 43(1) of the Road Transport Act 1987. The appellant is sentenced to a fine of RM1,500 and in default to six months imprisonment.

Plea Of Mitigation

The appellant's counsel submitted as follows on the sentence:

(1) the appellant is a first offender;

(2) the appellant is 50 years old;

(3) the appellant who was a Penghulu was suspended from his work as from 18 October 1997. The appellant has a wife and five children to support of which four of them are schooling;

(4) that the appellant be given a chance and that a non custodial sentence be imposed and that instead a lenient fine will suffice;

(5) the accident took place about six years ago;

(6) if the appellant is sentenced to imprisonment, he would loose his government job as a Penghulu.

Reply Of Deputy Public Prosecutor

In pressing for a deterrent sentence, the learned Deputy Public Prosecutor urged this court to impose a custodial sentence as there are far too many fatal accidents in the region and in the country. He submitted that the sentence to be imposed by this court must be a warning to other would be offenders and that an appropriate sentence should be imposed in the public interest.

Lesser Offence Under Section 43(1) Of The Road Transport Act 1987

In sentencing the appellant to a fine RM1,500 this court took into consideration the following:

(1) the plea of mitigation by the appellant's counsel that the appellant is a first offender;

(2) that any custodial sentence will deprive the appellant of his government job and earnings;

(3) the delay of about six years from the time the accident took place on 23 August 1994, the time the appellant was first charged in court on 18 November 1997 till his conviction on 5 November 1998 and till his appeal was finally heard on 7 July 2000 which was beyond the control and responsibility of the appellant;

(4) it is not desirable to sentence the appellant to imprisonment after a period of about six years from the time the accident took place which delay was not the fault of the appellant;

(5) the circumstances in which the accident occurred;

(6) however, the sentence to a fine should not be taken lightly by other would be offenders as each case is decided on its own set of mitigating factors, the facts of the case and the background of the appellant;

(7) The principles enunciated in other reported cases namely;

(a) In *Mohamed Jusoh bin Abdullah and Anor v. Public Prosecutor* [1947] 13 MLJ 130, the court of appeal approved of the following statement of the law in *Halsbury's Laws of England*:

The court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was commited, the degree of deliberation shown by the offender, the provocation which he received, if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his age and character.

(b) In *Lim Yoon Fah v. Public Prosecutor* [1971] 1 MLJ 37 at p. 38, his Lordship Chang Min Tat J (as his Lordship then was) said:

a particular criminal may be so induced only by a deterrent sentence of a long term of imprisonment. Another may well profit by being given a second chance. As the court of appeal had said in *Ho Kim Luan and Anor v. Public Prosecutor* [1959] 25 MLJ 159 at p. 162:

> Each case, of necessity, must depend upon its own facts and upon the character and antecedents of the offender.

(c) In *Raja Izzuddin Shah v. Public Prosecutor* [1979] 1 MLJ 270

No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice.

(d) In *Public Prosecutor v. Doraigunaraju a/l Krishnan* [1993] 3 CLJ 664 at p. 666, his Lordship Dato' Hj. Abdul Malik b. Hj. Ishak JC (as his Lordship then was) said:

It is trite law that no plea in mitigation should be brushed aside lightly but must in all fairness be examined and considered equally with the facts presented by the prosecution. Both aspects of the case (the prosecution and the defence) must be considered in their right perspective so as to strike, an equal balance, in the scales of justice.

(8) The character, age and antecedents of the appellant;

Sentence Of The Appellate Court

(9) the appellant is sentenced to a fine of RM1,500 and in default six months imprisonment and his driving licence ordered to be endorsed.